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Supreme Court of the United States

OCTOBER TERM, 1964.

No. 373

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF.

WALTER S. DAVIS,
HARNEY B. STOVER, JR.,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin,
Proctors for The Great Lakes Towing Company, Petitioner.

Of Counsel:
HARNEY B. STOVER,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ARGUMENT.

I.

BISSO v. INLAND WATERWAYS CORP., 349 U. S. 85 (1955), AND SUBSEQUENT DECISIONS OF THIS COURT PERTINENT THERETO APPLY ONLY TO EXEMPTION FROM LIABILITY CLAUSES IN TOWAGE CONTRACTS AND NOT TO LIMITATION CLAUSES OR THE CHARGING OF ALTERNATIVE RATES BASED UPON THE RISK ASSUMED.

In its answering brief respondent states that the Sixth Circuit actually considered the legality of the demurrage clause in petitioner's tariff in 1922 in *Hand & Johnson*

Tug Line v. *Canada S. S. Lines, Ltd.*, 6th Cir. 1922, 281 Fed. 779, and that eleven years later in *Great Lakes Towing Co.* v. *Bethlehem Transp. Corp.*, 6th Cir. 1933, 65 F. (2d) 543, the court merely determined whether certain claims "came within the purview of demurrage rather than special damages." This is not true. In considering the demurrage clause of petitioner's tariff in the 1933 decision, the court clearly reaffirmed its earlier decision stating the following at the close thereof:

> "The reasonableness of the limitation and the power to impose it were approved in that case and by this court in *Hand & Johnson Tug Line* v. *Canada S. S. Lines, Ltd.* (C. C. A.), 281 F. 779. Compare, also, *Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 41 S. Ct. 283, 65 L. Ed. 656; *Queen of the Pacific, supra.* With the reasoning of these decisions we fully agree."

In its answering brief respondent baldly states that this Court undertook to hear *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, 75 S. Ct. 629, 99 L. Ed. 911 (1955), "for the purpose of resolving conflicts between the several circuits with respect to towage liability limitation clauses" and that the *Bisso* case "clearly enunciated a public policy striking down any form of limitation clause in a towage contract." This also is not true. The decision of this Court in the *Bisso* case and that more recently in *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963), specifically and explicitly referred to release from *all* liability or exculpatory clauses. By no stretch of the imagination can the decisions of this Court in either of those cases be said to have directly or indirectly invalidated limitation of liability provisions in towage contracts. Even the United States Court of Appeals for the Seventh Circuit in the decision below in this case recognized this and stated that it was extending the reasoning of those two cases to the

instant case "even though the tariff provisions before us limit, rather than exclude, liability." There is clearly a direct conflict between the two prior decisions of the Sixth Circuit and the decision of the Seventh Circuit in this case as to the validity of the demurrage clause in petitioner's tariff.

II.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE CLEARLY EXTENDS DECISIONS OF THIS COURT BEYOND THEIR INTENDED AND STATED APPLICATION.

Respondent in its answering brief states that the stern first and winding (turning) clause in petitioner's tariff (Article 16) "was viewed by the Courts below as tantamount to exculpation." This is incorrect. The District Court upheld the validity of the clause expressly on the basis that it was a *limitation* clause and not one which purported to "excuse the tug from all liability." One need only to refer again to that portion of the decision of the Seventh Circuit quoted above to see that the Seventh Circuit viewed "the tariff provisions before" it as ones which "limit rather than exclude, liability."

Respondent argues that because petitioner has a virtual monopoly as to harbor towing in all the major ports of the Great Lakes, even though it is obliged to serve all customers who request service pursuant to the continuing injunction under which it is permitted to operate, the fact that its tariff is not subject to review by a regulative body places petitioner's customers at its mercy. Again, such is incorrect and untrue. The continuing injunction, set forth in full in the appendix of the petition (pp. 36-41), establishes a very substantial and rigid framework within which petitioner must operate to continue in business. In no uncertain terms it contains restrictions as to rate cut-

ting in the face of competition which force petitioner to charge no more than reasonable rates for its services. The court rendering the injunction retained jurisdiction of the cause and the injunction specifically provides for review at any time that either The Great Lakes Towing Company or the *United States of America* applies therefor. The injunction contains provisions specifically made similar to the original Interstate Commerce Act. *United States* v. *Great Lakes Towing Co.*, N. D. Ohio 1914, 217 Fed. 656. In this respect, the facts in the instant case are almost identical to those considered by this Court in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921), except that in the instant case a towing company is being considered and in the *Western Union* case the Western Union Telegraph Company was being considered. This Court had no difficulty in the *Western Union* case in upholding the validity of charging alternative rates for the sending of messages based upon the risk assumed by the telegraph company, and in that instance there was not even provision for unlimited liability but only two degrees of limited liability based upon the alternative rates paid therefor.

Respondent argues for, and the Seventh Circuit evidently adopted, a theory that "commercial certainty" is lacking because the escalation provision in the stern first and winding (turning) clause of petitioner's tariff has little meaning where the vessel owner cannot anticipate the measure of damages to its vessel so as to be able to make a judgment about higher valuations and rates. In making this argument both respondent and the Court of Appeals fail to take into consideration that which is so patent as to be self-evident and which was one of the primary bases for the decision of the District Court. The stern first and winding (turning) clause is only effective so long as the vessel owner elects to use but one tug in that particular

operation. The vessel owner has three very distinct choices: to use one tug at the base rate with limited liability on the part of the tug; to use one tug at an increased rate somewhere between the base rate and double the base rate with a correspondingly increased liability on the part of the tug; to use two tugs without any limitation as to their liability. In no instance does the vessel owner have to pay more than double the base rate for the use of two tugs, in which case the limitation provision becomes inapplicable. Can anything bring more absolute certainty to a situation where *both* the vessel owner and the tug owner "cannot anticipate the measure of damages" to the vessel?

Respondent argues that the terms of petitioner's tariff are dictated to and imposed upon it, but there is no proof thereof in the record. As a matter of fact, the record is clear that on one of two previous trips in 1961 the Steamer Detroit Edison made a similar movement using two tugs and that on a subsequent trip during the same season of navigation the Detroit Edison made a stern first movement from the Inland #2 dock to the Inland #4 dock without the assistance of any tugs. There is nothing in the record to indicate that the use of a tug or tugs by the Steamer Detroit Edison for the movement in question on May 23, 1961 was necessary. The only evidence in the record is that such was desired by the master of the steamer. In the absence of such evidence, it is difficult to say that petitioner imposed any terms upon or dictated any terms to respondent. It is clear that the choice was solely that of respondent. It had the election of using no tugs, of using one tug and paying the base rate therefor with limited liability, of using one tug and paying an increased rate therefor with an increased limitation in the liability, and of using two tugs with unlimited liability.

Harbor towing operations may and do vary considerably

from a tug or tugs with a dead, unmanned tow, such as a barge or flotilla of barges or a grain boat being used for storage purposes, all the way up to a tug, or more than one tug, with a live, fully manned tow operating her own engines and helm. *Stevens* v. *The White City*, 285 U. S. 195, 52 S. Ct. 347, 76 L. Ed. 699 (1931). The responsibilities have been held to vary as between tug or tugs and live, fully manned, tow dependent upon the number of tugs assisting the vessel in tow and their assisting positions. Where two tugs assist a vessel, one at the bow and one at the stern; or where the tug is in sole charge of the navigation, it is sometimes said that the tug (or tugs) is the "dominant mind" of the venture. *Sturgis* v. *Boyer*, 65 U. S. (24 How.) 110, 16 L. Ed. 591 (1861); *The W. G. Mason*, 2nd Cir. 1905, 142 Fed. 913. Where one tug is assisting a fully manned vessel with its own motive power and steering apparatus operating or available for use, it is well settled that the tug and vessel together are engaged in a joint and cooperative effort. *The Maria Martin*, 79 U. S. (12 Wall.) 31, 20 L. Ed. 251 (1871); *Great Lakes Towing Co.* v. *Bethlehem Transp. Corp.*, 6th Cir. 1933, 65 F. (2d) 543; *American Steamship Co.* v. *Great Lakes Towing Co.*, N. D. Ohio 1947, 73 F. Supp. 359, affirmed, 6th Cir. 1948, 165 F. (2d) 368, cert. den., 333 U. S. 881, 68 S. Ct. 913, 92 L. Ed. 1156. Such was the situation in the instant case and both lower courts agreed thereon. Each vessel was dependent upon the other to successfully fulfill certain duties and obligations. In addition, the instant case concerned a stern first, turning maneuver. The stern first and winding (turning) clause really does no more than establish alternative rates for that particular class and type of service based upon the risk to be assumed by petitioner. The fact that the amount of the limitation is disproportionate to the amount of the claim for damage is of no consequence in determining the validity of the

provision. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921); *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576 (1915); *Petition of Isbrandtsen Company*, 2nd Cir. 1953, 201 F. (2d) 281. The facts that there are alternative rates, that they are based upon the risk assumed, that there is provision for unlimited liability and that the rates are fixed within a legal framework specifically applicable thereto (such as the continuing injunction pursuant to which petitioner is required to operate, or the old Interstate Commerce Act) make the rates and the limitation provisions applicable thereto valid and raise the presumption that they are reasonable. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921). Not one shred of proof was offered in the instant case to show that the rates and limitations contained in the petitioner's tariff were unreasonable and the District Court found them to be reasonable. No proof as to the economics of the operations of either petitioner or respondent was offered whereby a finding of unreasonableness could be justified.

The decision of the Seventh Circuit in this case clearly and admittedly extends the decisions of this Court in *Bisso* and *Dixilyn* from release from *all* liability clauses to limitation of liability clauses or clauses purporting to charge alternative rates for services to be performed based upon the risk assumed. In so doing the Seventh Circuit went beyond the bounds prescribed by this Court.

III.

PETITIONER SEEKS ONLY TO HAVE EQUAL CONSIDERATION WITH RESPECT TO THE BASIC RULES OF LIABILITY.

Respondent argues that petitioner has cited no authority to support its contention that it is entitled to special consideration with respect to the basic rules of liability. Such an argument twists the position of petitioner completely. Petitioner is seeking only to have itself treated in accordance with the basic rules of liability.

Under respondent's so-called basic rules of liability, parties which contract at arm's length and from equal bargaining positions not only have the right to limit liability by contract but have the right to release themselves by contract from *all* liability for negligence. It is only when the bargaining position between the parties becomes unequal that courts have held that the party bargaining from a superior position cannot release itself from all liability. This has been the case with common carriers, employers, bailees and public service companies. However, the very fact that such have been prohibited from contracting to release themselves from all liability has been acknowledged to place them at the lesser end of an unequal bargaining position. Therefore, they have been specifically permitted to contract for *limited* liability through the use of alternative rates based upon the risk assumed. The decision below of the Seventh Circuit denies petitioner even that right.

In *Bisso* and *Dixilyn* this Court removed towers from the category of ordinary business entities because of the nature of the business and specifically equated them with bailees, employers and public service companies. In doing so this court held that towers could no longer release themselves from *all* liability by contract but made no mention whatso

ever of limitation of liability provisions in contracts or the charging of alternative rates based upon the risk assumed. *Mississippi Valley Barge Line Company* v. *T. L. James & Co.*, D. C. La. 1956, 144 F. Supp. 662, affirmed, 5th Cir. 1957, 244 F. (2d) 263, cert. den., 355 U. S. 871, 78 S. Ct. 121, 2 L. Ed. (2d) 76, so freely quoted and heavily relied upon in respondent's answering brief, like *Bisso* and *Dixilyn* treated only with a release from *all* liability or *exoneration* clause and not a *limitation* clause. The Seventh Circuit in the decision below removed petitioner from equality with bailees, employers and public service companies by stating that it not only could not release itself from all liability by contract but that it could not contractually limit its liability in the limited situation of a stern first or winding (turning) maneuver by charging alternative rates based upon the risk assumed with provision for unlimited liability upon payment of double the base rate with the use of two tugs. This places petitioner in a unique and extremely difficult position. Under the terms of the injunction pursuant to which it is permitted to operate, petitioner must serve all who request service in accordance with the requests. If a vessel owner requests the assistance of one tug, petitioner must furnish it. If the vessel owner requests the assistance of two tugs, petitioner must furnish it. Petitioner has no right to refuse the service requested except where there is question as to the financial responsibility of the vessel owner requesting the service. Petitioner must fix and publish its rates within a rigid framework laid down by the injunction. Under the decisions in *Bisso* and *Dixilyn*, petitioner cannot release itself by contract from *all* liability for the negligence of its tugs. Under the decision of the Seventh Circuit below, petitioner cannot contractually limit its liability for negligence, even as to limited classes of service, and, in effect, cannot charge alternative rates for the service requested based upon the

risk assumed. Petitioner is at the lesser end of not only an unequal bargaining position, but also one which is wholly untenable.

IV.

AS TO THE ISSUES OF LIABILITY, THE STEAMER DETROIT EDISON HAD AN ABSOLUTE DUTY AS TO LOOKOUT FOR THE BENEFIT OF BOTH VESSELS AND FAILED TO FULFILL THAT DUTY.

Respondent argues in its answering brief that petitioner's tug had visibility down one side of the Steamer Detroit Edison at all times and could see the Inland #4 dock which the vessels were approaching. This is true. However, visibility down one side of the steamer from a position over 600 feet away from the steamer's stern as it approached the Inland #4 dock, with absolutely no visibility astern of the steamer and no visibility to the other side of the steamer, certainly cannot be said to give those aboard the tug a clear and unobstructed view of the approach to the dock. Such would make a mockery of the requirement that a vessel keep a lookout at all times and that the lookout be posted as far forward as is possible. *Weyerhaeuser Steamship Co.* v. *United States*, N. D. Cal. 1951, 174 F. Supp. 663. Had the Tug Montana been charged with the duty of maintaining a lookout astern of the Steamer Detroit Edison for both vessels, the tug would undoubtedly have been held negligent for not having a man on the stern of the steamer. It would have been insufficient for the tug at her position at the steamer's bow to maintain a lookout astern of the steamer. As set forth in the petition, under the law it was the duty of the steamer to maintain a lookout at her stern for the benefit of both vessels. Such a lookout was physically maintained. The steamer's first mate on duty at her stern called back the various distances to the steamer's pilot house and gave warning that he felt

the speed astern to be excessive. None of those messages from the steamer's stern to her pilot house were relayed to the tug. The tug was held negligent for moving the steamer too fast astern, for selecting and initiating an unsafe course for the steamer and for permitting the stern of the steamer to come too close to the dock before attempting to swing the steamer for a landing. No one was in a better position to be apprised of these failures on the part of the tug then the lookout on the steamer's stern and the steamer's master up high in the pilot house. When the steamer's stern was 600 feet away from the dock, her master felt some danger. When her stern was 400 feet away from the dock, the mate on her stern started calling out distances and warnings to her pilot house. The one and only communication from the steamer to the tug was not given until her stern was less than 300 feet away from the dock. Respondent seeks to escape the responsibility for lookout and all that it entailed by stating that those aboard the tug could see the dock at all times as the steamer was approaching it. This is only a half-truth. They could see only a portion of the dock and that was not the portion where the steamer was to dock. It is self-evident that, from their position over 600 feet away from the steamer's stern and looking down only one side of the steamer, they could not tell what was directly astern of the steamer or to the other side. It is uncontroverted that those aboard the tug were relying upon the steamer for information as to her course and speed and the position of her stern with reference to the dock. It is uncontroverted that those aboard the steamer knew this. It is uncontroverted that those aboard the tug did not even know that a collision had occurred until afterward. With these facts in mind, how can it be said that the failure of lookout on the part of the steamer, by her lack of communication with the tug, could help but have caused or contributed to the cause of the

accident? Under the rule of *The Pennsylvania* v. *Troop*, 86 U. S. (19 Wall) 125, 22 L. Ed. 148 (1874), the failure of lookout placed the burden upon respondent to prove that it not only might not have been one of the causes, or that it probably was not one of the causes, but that it *could not* have been one of the causes of the resultant collision. Both the decision of the District Court and that of the Seventh Circuit were silent on the subject. Neither even mentioned the facts concerning the steamer's stern lookout and the lack of communication to the tug, much less the law applicable thereto. The breach of duty on the part of the steamer was clearly a cause, if not the cause, of he collision of the steamer's stern with the Inland #4 dock.

CONCLUSION.

For the reasons set forth above as well as those set forth in the petition herein, it is respectfully submitted that the petition for writ of certiorari should be granted and that this Court should determine the issues between the parties upon the merits.

Respectfully submitted,

WALTER S. DAVIS,
HARNEY B. STOVER, JR.,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin,
Proctors for The Great Lakes Towing Company, Petitioner.

Of Counsel:
HARNEY B. STOVER,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin.